SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 517

PHIL A. ST. AMANT,
Defendant-Relator

versus

HERMAN A. THOMPSON,
Plaintiff-Respondent

Appeal from the Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

THE FEDERAL RULE ARGUED AS A DEFENSE WAS NEVER PROPERLY PLEADED, RAISED OR PRESERVED AND IS NOT PROPERLY BEFORE THIS COURT.

Reference to the responsive pleadings filed on behalf of Defendant-Relator (R. 10-16) reflects that the only defense urged was that of truth of the statements made.

Louisiana Code of Civil Procedure Articles 1003 and 1005 requires that all affirmative defenses be specifically pleaded. This same issue was presented in the case of Curtis Publishing Company vs. Butts, 351 F. 2d 702, (5 Cir., 1965). In the Curtis Publishing Co. case the constitutional defense was presented and the plaintiff, Wally Butts, urged that such a defense had not been timely raised or preserved in the lower courts. The Fifth Circuit agreed holding that the defendant had forfeited its constitutional argument by its failure to make a timely assertion of the right. This same requirement has been more recently reiterated in Associated Press vs. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094, wherein the Court observed:

> "I have no difficulty in concluding that No. 150, the Associated Press vs. Walker, must be reversed since it is in clear conflict with New York Times. The constitutional defenses were properly raised and preserved by the petitioner. The trial judge expressly ruled that no showing of malice in any sense had been made, and he reserved an award of punitive damages for that reason."

Of further significance, is the fact that the instant case was heard on the merits during the month of May, 1964 (R-2) and New York Times Co. vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686, was decided in March, 1964. Additionally, although a motion for a new trial was filed on May 18, 1964, (R-2), the issue was not pleaded nor was any amendment made to the pleadings to properly assert and preserve this affirmative defense.

Accordingly, we do now and have always maintained that the New York Times rule was never properly raised nor preserved as a defense.

II.

PLAINTIFF-RESPONDENT, HERMAN A. THOMPSON, IS NOT A "PUBLIC OFFICIAL" WITHIN THE NEW YORK TIMES RULE NOR IS HE A "PUBLIC MAN IN WHOSE PUBLIC CONDUCT SOCIETY AND THE PRESS HAVE A LEGITIMATE AND SUBSTANTIAL INTEREST."

In New York Times, supra, at footnote 23, this Court observed:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included."

In Rosenblatt vs. Baer, 383 U.S. 75, 86 S.Ct. 669 (1966) further elaboration on the New York Times was made:

> "Turning, then, to the question whether respondent was a 'public official' within New York Times, we reject at the outset his suggestion that it should be answered by reference to state-law standards. States have developed definitions of 'public officials' for local administrative purposes, not the purposes of the national constitutional protection."

While it is true, as stated in the brief of Defendant-Relator, that all three courts in the State of Louisiana found the Plaintiff-Respondent to be a "public

official" within the Federal Rule, we nevertheless still maintain that such a conclusion is not only incorrect but likewise violates the fundamental concept of fairness and equal opportunity when the relative positions and status of the individuals concerned in the instant case are considered. Further, the Court in New York Times analogized the privilege for criticism of official conduct to the protection afforded a public official when he is sued for libel by a private citizen. Continuing the discussion of this analogy, the Court observed "The states accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privileges they enjoy." This indicates that a differentiation should be made between bona fide public officials and lesser officials for whom and against whom the privilege would not apply. This question was further elaborated on by this Court in Rosenblatt, wherein the Court observed:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

Further comment was made in Rosenblatt:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply."

Considering this Court's most recent enunciation on this principle in Associated Press vs. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed 2d 1094 the application of the rule appears to have been further extended, as suggested in New York Times and Rosenblatt, to include "A public man in whose public conduct society and the press had a legitimate and substantial interest."

Not only has the New York Times defense not been timely or properly asserted, the record is absolutely barren of any proof as to the activities, position, and duties of the plaintiff-respondent, Herman A. Thompson. Any and all conclusions drawn as to whether Herman A. Thompson was or was not a "public official" or a "public man" is based entirely upon assumptions since no facts were offered in support of the defense. The most that can be assumed was that Deputy Sheriff Thompson was a salaried employee and would not be "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."

Additionally, consideration should be given to the relative positions of the parties involved in each case. In New York Times, Rosenblatt, and Associated Press vs. Walker, the individuals allegedly defamed were in position to speak back and perhaps be heard. In the instant case, the defendant-relator, Phil A. St. Amant was engaged in a state wide campaign for U.S. Senator and appeared on television to present his case and supposedly expose his opponent, the incumbent U. S. Senator

Russell B. Long. Deputy Sheriff Herman Thompson was completely removed and not even remotely connected with this campaign. He was a salaried employee without the means to purchase state wide television time and not being a candidate himself or being involved in political activities, how much attention would he draw if time was made available to him? There must be an answer and we submit that that answer lies in a limitation upon the applicability of the New York Times rule in such a situation as presented in the instant case.

III.

MALICE WAS ALLEGED AND PROVEN ON THE PART OF PHIL A. ST. AMANT EVEN IN THE ABSENCE OF A PROPER ASSERTION OF THE DEFENSE.

Under Louisiana Jurisprudence, the test of whether a statement is libelous, is the effect the article or statement is fairly calculated to produce, the impression it would naturally engender in the minds of the average persons among whom it is intended to circulate. Madison vs. Bolton, 234 La. 97, 102 So. 2d 433.

The trial judge properly concluded that the inference to be drawn and the actual charge made by Phil A. St. Amant (R-146) was to the effect that there was a "pay off" between Herman A. Thompson and others. In this connection, the Court concluded (R-146 - 147) as follows:

> "The only proof that this Court has is the fact that the money did pass, which was freely admitted by the plaintiff, and that is not sufficient evidence to attach any dishonest motive to Captain Thompson in view of the other testimony by him and as possibly the admissions of the defendant himself that he

intended to attribute no dishonest motive to him, but nevertheless, that mere fact of receiving that money is not proof of dishonesty on his part. It is not proof of his taking a pay off, nor proof that because of his connections with Partin he would not do his duty as a law officer. Proof of those charges, which are implicit in the language of the statement, would be his only defense under our law."

In finding that actual malice existed on the part of defendant-relator, the trial court further observed (R-157):

"Mr. St.Amant stated that he intended no malice toward Captain Thompson, that he was in a political fight with Senator Russell Long and had no interest in Captain Thompson. In reply to a question by plaintiff's counsel as to whether he gave any consideration to what effect the statement and the affidavit of Mr. Albin would have on Captain Thompson, he replied that Captain Thompson was not even in his mind. He further testified that he did not consider that Captain Thompson would be harmed by the statement and that he did not know what the money was for and that for all he knew the same could have been for Thompson's favorite charity. Finally, he admitted that as far as he was concerned he would let the public draw whatever inference it liked with regard to his reference to Captain Thompson.

Therefore, if Mr. St. Amant did not even know Captain Thompson or have any interest in him, and if he did not know what the money was for, which is

> evidence that he made no attempt to investigate whether there was any relationship between Mr. Partin and Captain Thompson, to justify his charge that Captain Thompson was being paid off, and if he never gave any consideration as to what effect those remarks might have on Captain Thompson's reputation and character and was content to let the public draw whatever inference it desired concerning these remarks, then fairness dictates that despire defendant's avowed absence of ill will toward Captain Thompson or intent to do him harm or damage, he acted with reckless and wanton disregard for whether the statement was false or not and in the language of the Sullivan case 'with disregard of whether it (the statement) was false or not.'"

Thus, while counsel for defendant-relator lays great stress on what they term "imputed or implied malice", such is not the case. The trial judge not only had ample opportunity to observe the demeanor of the defendant-relator on the stand, but had plenty of admissions and other remarks from the defendant-relator from which to draw his conclusions. Counsel argues that Mr. St. Amant obtained the affidavit of Mr. J. D. Albin upon which he relied, however, this affidavit was not obtained for Mr. St. Amant's protection but due to requirements of the television station. Mr. St. Amant admitted (R-31):

> "However, because of legal advice to the station and checking with the F.C.C.C. of their legal responsibility, at this time it was determined that the original film would not be used on this program. Instead, I will read to you the signed affidavit of Mr.

J. D. Albin as the testimony exactly as given."

Consequently, the affidavit was obtained and read in lieu of the live testimony by Mr. Albin only at the direction of the television station. Thus, counsel's argument to the effect that Mr. St. Amant had a right to rely on this affidavit certainly does not come forward in good faith.

We submit that a thorough review of the state court decisions, from the trial court through the Supreme Court, reflects that even though the federal rule was not properly asserted nor preserved, that the federal decisions were applied, properly considered and correct conclusions reached. The Supreme Court of Louisiana has constantly followed the federal rules in this respect as is evidenced by the most recent decision of Edwin A. Walker vs. Associated Press, et al (S.Ct. of La., 1968) 206 So. 2d 489 wherein the latest expressions of this Court were considered and the decision of the Appellate Court in favor of General Walker was reversed and plaintiff's suit dismissed.

WHEREFORE, respondent respectfully prays that the judgment of the Supreme Court of Louisiana be affirmed at defendant-relator's cost.

Respondent further prays for such other and further relief in the premises